

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

75-6063

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

J. C. B. SUPER MARKETS, INC.

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT
OF AGRICULTURE,

Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK, CIVIL ACTION NO. 1970-282.

BRIEF FOR APPELLEES

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DATE RECEIVED - NOVEMBER 7 1975
U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
RECEIVED - NOVEMBER 7 1975





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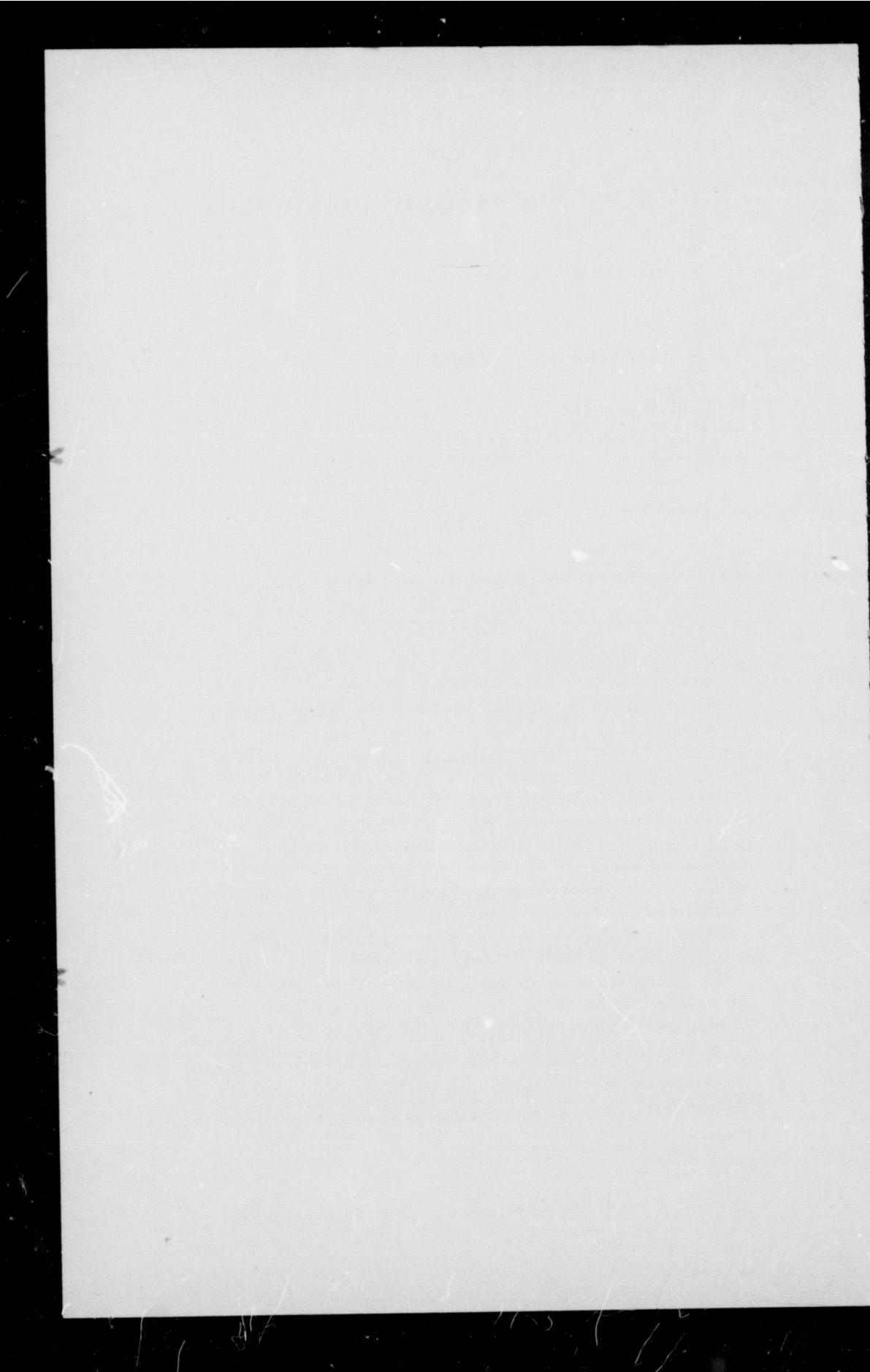
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IN THE
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75-6063

J.C.B. SUPER MARKETS, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and UNITED
STATES DEPARTMENT OF AGRICULTURE,
Defendants-Appellees.

On Appeal From A Judgment Of The United States
District Court For The Western District Of
New York, Civil Action No. 1970-232.

BRIEF FOR APPELLEES

Statement of the Case

J.C.B. Super Markets, Inc., (JCB) filed suit in the United States District Court for the Western District of New York, seeking judicial review of the determination by the United States Department of Agriculture (USDA), made on May 6, 1970, that the super market be disqualified from participating

in the food stamp program for a period of thirty days because of violations committed by JCB in accepting food stamps for non-food items. The Court denied USDA's motion for summary judgment, *J.C.B. Super Markets, Inc. v. United States*, 57 F.R.D. 500 (W.D.N.Y. 1972), and a trial *de novo* was held on July 30 and 31, 1973 in accordance with Title 7, United States Code, Section 2022. In a decision and order dated June 10, 1975 the Honorable John T. Curtin, Chief Judge, United States District Court, directed entry of judgment in favor of the United States (Appendix 54). JCB appeals from this judgment.¹

Statutes and Regulations

The purpose of the food stamp program is set forth in Title 7, United States Code, Section 2011² which provides that

It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units and other agencies to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in

¹ Judge Curtin granted JCB's application for a stay of the judgment pending appeal, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure.

² All statutory references hereinafter are to Title 7, United States Code.

more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

Pursuant to Section 2013(a),

The Secretary is authorized to formulate and administer a food stamp program under which, at the request of the State agency, eligible households within the State shall be provided with an opportunity to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than the charge to be paid for such allotment by eligible households. The coupons so received by such households shall be used only to purchase food from retail food stores which have been approved for participation in the food stamp program . . .

As defined by Section 2012(b), the term "food"

means any food or food product for home consumption except alcoholic beverages and tobacco and shall also include seeds and plants for use in gardens to produce food for the personal consumption of the eligible household.

See also 7 C.F.R., Section 270.2(s).³

A participating retail store or wholesale concern may be disqualified from the program in the manner set forth in Section 2020:

Any approved retail store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the

³ At the time JCB was disqualified from the food stamp program, the regulations implementing the Food Stamp Act could be found at 7 CFR Parts 1600 through 1603. Since July 29, 1971, the regulations have been codified in 7 CFR Parts 270 through 275.

regulations issued pursuant to this chapter. Such disqualification shall be for such period of time as may be determined in accordance with the regulations issued pursuant to this chapter. The action of disqualification shall be subject to review as provided in Section 2022 of this Title.

The Secretary of Agriculture has implemented this statutory provision in 7 CFR Section 272.6(a) which provides that

Any authorized retail food store, authorized food service or authorized wholesale food concern may be disqualified from further participation in the program by FNS (Food and Nutrition Service) for a reasonable period of time, not to exceed 3 years as FNS may determine, if such firm fails to comply with the Food Stamp Act or the provisions of this part.⁴

The administrative review procedure is set forth in 7 CFR 272.6 to 272.8 and 273.1 *et seq.*

After the food stamp officer has made his determination as to the appropriate action to be taken in a particular case, the store may seek judicial review in accordance with Section 2022(c), which provides that

If the store or concern feels aggrieved by such final determination he may obtain judicial review thereof by filing a complaint against the United States in the United States district court for the district in which he resides or is engaged in business or in any court of record of the State having competent jurisdiction, within 30 days after the date of delivery or service of the final notice of determination upon him, requesting the court to set aside such determination . . . The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of

⁴ At the time of JCB's disqualification, this provision was contained in 7 CFR Part 1602.6(a) in essentially the same form.

the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence . . .

Statement of Facts

On March 14, 1966 USDA authorized JCB to participate in the food stamp program and to accept food stamp coupons in exchange for food items (Transcript of proceedings, 9-10). Between April 14, 1966 and October 23, 1968 USDA representatives made eleven visits to the store to ascertain whether the store's employees and management understood and were complying with the food stamp regulations. Violations of the regulations were noted on five separate dates when the USDA representative saw JCB's employees allowing customers to purchase ineligible items with food stamps. While still at the super market, the representative advised store personnel of the violations and instructed these personnel in the proper procedure to be followed in food stamp transactions. After each such visit, a confirming or warning letter was sent by USDA to JCB, formally advising the super market of the violations observed. All of these letters called to the attention of the super market's management the seriousness of the violation and the penalties that could result if violations continued to occur. (Def Exh 3, 5, 7, 9 and 11, Suppl App 1-5).

Dissatisfied with the store's poor record of compliance with the food stamp procedures, USDA sent Annie Mae Crum, an investigative aide or shopper, to the store to attempt to purchase ineligible items with her food stamps. During three of her shoppings, store personnel accepted her food stamps in return for the ineligible items. As a result of these violations, a formal letter of charges was sent to the super market, detailing these purchases (Def Exh 16, Suppl App 6-7). JCB was afforded the opportunity to present any matters in

defense or in mitigation to the officer in charge of the Buffalo USDA office. Thereafter, on May 21, 1969 the file was forwarded to the regional office in New York City with a recommendation that the store be disqualified from the program for thirty days. (Def Exh 17, Suppl App 8-13). In due course the regional director forwarded the matter to USDA's Food Stamp Division recommending that the store be disqualified for sixty days (Def Exh 18, Suppl App 14-15). The director of the Food Stamp Division approved the sixty day disqualification (Def Exh 19, Suppl App 16-17). JCB then appealed to USDA's food stamp review officer, Peter Shambora. The super market submitted an appeal letter to Mr. Shambora, citing mitigating factors (Def Exh 25, Suppl App 18-23). At JCB's request, Mr. Shambora came to Buffalo on October 16, 1969 where he met personally with store representatives. After the meeting, JCB forwarded additional material to him for his consideration in deciding the appeal. Finally, by letter of May 6, 1970, Mr. Shambora advised the super market that he would reduce the disqualification period from sixty days to thirty days (Def Exh 27, Suppl App 24-25). Shortly thereafter, and prior to the effective date of the disqualification, JCB filed suit in the district court, seeking review of the agency's action.

Questions Presented

1. Were the District Court's findings "clearly erroneous" and should they be set aside?
2. May J.C.B. Super Markets, Inc., be held liable for the acts of Betty Gainer, one of its employees?
3. May the District Court modify the sanction imposed by the Department of Agriculture?

POINT I

The District Court's findings are not "clearly erroneous" and should not be set aside.

During the course of the two day trial five witnesses testified. Charles Closs and John Cobb, both USDA employees, testified regarding numerous food stamp violations observed by USDA at the super market prior to March 1969 and the several letters and warnings sent to the store, advising that further violations could result in disqualification from the program. Joseph Perna, the store owner, testified regarding the store's problems and his expectations of dire economic consequences should the store be disqualified for thirty days. However, the primary basis for Judge Curtin's findings that the shoppings took place was the testimony of Annie Mae Crum and Solomon Goodman.

Annie Mae Crum testified that she was employed periodically by USDA to shop at super markets suspected of food stamp violations and attempt to purchase ineligible non-food items with food stamps. On March 25, 1969, Solomon Goodman, a USDA investigator, prepared and gave to Miss Crum a list of food and non-food items to purchase with food stamps from the JCB store (App 6-8). Miss Crum went to the store, picked out the articles on Mr. Goodman's list and took them to a check out counter where she gave a female clerk food stamps in payment for her entire purchase (App 8-14). Included were such ineligible items as beer, paper napkins, paper towels, and detergent (App 11). Miss Crum returned to Mr. Goodman's automobile where the two of them prepared a report of Miss Crum's purchases, together with a description of the clerk who sold her the merchandise (App 15-17). She testified that she returned to the same store the next day where Mr. Goodman instructed her to attempt to purchase

additional ineligible items from the same person who sold her the items the day before. On this second visit Miss Crum purchased beer, detergent, a scraper, soap, moth balls, shoe laces, and tissue with the food stamps (App 19-22). She returned to the store for a third visit on March 27, 1969, where she was told to purchase more ineligible items from another clerk (App 28). She followed the same routine that day and approached a male clerk with paper towels, a knife, a light bulb, detergent, a dish cloth, together with several food items. The clerk accepted Miss Crum's food stamps for the entire purchase (App 29-31).

Mr. Goodman testified that on March 25, 26 and 27, 1969, he gave Miss Crum a list of ineligible items to purchase from JCB (Suppl App 29). On each occasion she returned from the super market with the ineligible items (Suppl App 35, 41, 44). Mr. Goodman went to the store approximately two or three weeks later and interviewed John Cusack, the store manager, regarding the three shoppings by Miss Crum (Suppl App 68). At that time Mr. Goodman determined that Betty Gainer was the female cashier from whom Miss Crum had bought the articles on March 25 and 26 (Suppl App 66). According to his testimony, the basis for his identification of Miss Gainer was essentially four-fold: (1) Miss Crum's description of her, including sex, race, age, weight and height (Suppl App 66-67); (2) his conversation with the store manager (Suppl App 61, 66); (3) the due bill furnished Miss Crum on one of her shoppings, which contained the clerk's initials or cash register number (Suppl App 60, 69); and (4) his interview with Betty Gainer at which time she said "she cannot explain why she sold ineligible items for food stamps and probably was careless when she did so" (Suppl App 78-79).⁵ Mr. Goodman further testified that it was John Cusack,

⁵ Appellant makes much ado of the Government's "failure" to retain and produce at trial any due bills or cash register tapes which would indicate

(Footnote continued on following page)

the store manager who sold the ineligible items to Miss Crum on March 27. Mr. Goodman's identification of Mr. Cusack was based upon a description furnished by Miss Crum and his interview with Mr. Cusack within two or three weeks after the shoppings took place (Suppl App 49, 65-66, 68).

On the basis of all the evidence adduced at the trial, Judge Curtin ruled that "I am satisfied from the evidence that the shoppings of March 25, 26 and 27, 1969 were made and that on these occasions the investigative aide for the Department of Agriculture purchased the ineligible non-food items charged" (App 59). As Rule 52(a) of the Federal Rules of Civil Procedure dictates, findings of fact made by a trial judge sitting without a jury should not be set aside "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". Therefore, Judge Curtin's findings that the food stamp violations did occur should not be set aside unless this Court is satisfied that his findings were "clearly erroneous".

The evidence before the trial Court indisputably established that Miss Crum was able to purchase several non-food items with her food stamps from J.C.B. Super Markets. Indeed, the only issue raised by JCB in this appeal relating to the evidence at the trial is whether the Government proved that the sales to Miss Crum were made by Betty Gainer and John Cusack. In response to the argument by counsel for JCB that the Government had failed to establish the identities of

(Footnote continued from preceding page)

the name of the cashier who sold the ineligible food items to Annie Mae Crum on the three dates in question. However, despite these protestations at trial and before this Court, during the four and one half years between the dates of violation and date of trial JCB made no attempt to obtain or examine these items or even inquire as to their existence or availability, even though it is now alleged that they are so essential to a fair determination of the facts.

the culpable clerks, Judge Curtin posed the following question: "What if the Government said that 'we don't know who the clerk was, it was a clerk', and she was in the store? What I am saying to you or asking you, didn't the Government by giving you the Gainer name give you more than you were really entitled to?" (Suppl App 84). Judge Curtin's point is well taken. Where the super market does not dispute the dates, times and places of each violation, or the names of the individuals who purchased the items, or the actual items purchased with the food stamps, the amounts of the purchases, or the manner in which the shoppings took place, it cannot credibly maintain that the trial Court's findings that the shoppings took place were "clearly erroneous".

However, the trial Court could base its further findings that Miss Gainer and Mr. Cusack made the sales to Miss Crum on the testimony of Mr. Goodman regarding his identification of the two subjects, and his conversation with Miss Gainer and Mr. Cusack when they admitted their guilt. Moreover, Joseph Perna, JCB's owner, testified and confirmed the identifications of Miss Gainer and Mr. Cusack when he acknowledged that, shortly after the events, both employees admitted their guilt to him (Suppl App 90-93).

JCB's contention that the disqualification statute is penal in nature is without any basis in fact or law. JCB has no "right" to participate in the food stamp program. In Section 2011 the Congress very clearly specified that the purpose of the food stamp program was "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low income households" to the end that hunger and malnutrition may be alleviated. Indeed, Section 2011 requires all retail food stores who desire to participate in the program to make the necessary application to the Secretary of Agriculture and obtain his approval to accept food stamps. Moreover, the civil nature of the disqualification sanction may be contrasted

with Section 2023 which authorizes a five year imprisonment term or \$10,000 fine for anyone who attempts to redeem food stamps, knowing the food stamps to have been received in a manner violative of the Food Stamp Act. While acceptance of food stamps in payment for ineligible retail merchandise may constitute an offense under this section, see *United States v. Cash*, 486 F.2d 295 (5th Cir., 1973), JCB has not been charged with any crime, but rather has temporarily lost its license to accept food stamps.

POINT II

J.C.B. Super Markets, Inc., may be held liable for the acts of Betty Gainer, one of its employees.

JCB argues that the sales by Betty Gainer should not be imputed to the super market since her conduct was unauthorized by the store, and contrary to specific instructions received by her from the management of the store. In support of this contention, JCB refers to testimony by Miss Crum to the effect that Betty Gainer knew she should not permit Miss Crum to buy the ineligible items with food stamps. However, it is readily apparent from the quotations excerpted from the transcript by JCB in its brief that Miss Crum never testified about any instructions Miss Gainer may have received from her employer. While counsel for JCB attempted at trial to establish that Miss Gainer's actions were contrary to store policy, Miss Crum quite obviously had no idea whatever of the instructions Miss Gainer may have received from store personnel. Counsel for JCB put the question directly to Miss Crum:

Q. Did she tell you that the management of the store had instructed her that she could not give you those items?

A. No, she didn't say if anyone had said to her not to.
(App 45-46)

Whatever doubt or uncertainty may have existed regarding Miss Crum's knowledge of store policy is effectively resolved by her unequivocal answer that she knew nothing about instructions Miss Gainer may have received from anyone regarding the acceptance of food stamps for non-food items.

Since JCB did not call Miss Gainer to testify at the trial, the only evidence regarding store policy and instructions given to employees regarding food stamp transaction was the following testimony of Mr. Perna, responding to questions by JCB's counsel:

Q. All right. Now, Betty Gainer, do you know her personally?

A. I do now. She is still with me.

Q. I see, and do you know the training that she received when she came to your store?

A. Whe she started she got the routine training, the same training we give everyone else.

Q. And what is that training?

A. They work with an experienced cashier for 20 hours on the register. Then they are,—after that period they are interviewed and questioned on their knowledge of their particular job.

Q. All right, and are they,—would you state whether they are questioned with respect to the food stamp operations?

A. That is primarily the questions that we work on. The food stamp program has caused us to spend at least twice as much time in training people. (Suppl App 94-95).

The only other testimony regarding this subject was elicited on cross examination of Mr. Perna:

Q. Now, are these, all these personnel, manager, assistant managers and head cashiers trained in food stamp procedures?

A. Yes, they are.

Q. And who trains them?

A. Well, it's—by the time they reach the point where

they do have this responsibility, they have probably trained themselves and then we check to see that they do know it thoroughly.

Q. How do they go about training themselves?

A. Well, if they start out as a stock boy, it is unnecessary for us to train them on the Food Stamp Program, so in their observations, in their observations while they are working there and from word of mouth and conversation in the coffee area, they do get pretty rounded knowledge and by the time they become assistant managers, all we do is check to see if they do know it thoroughly and if they do, we just let it go at that, and I am confident that they do know it thoroughly by the time they get to be assistant managers. (Suppl App 96-97).

One searches Mr. Perna's testimony in vain to find the instructions he and his managers gave to the cashiers regarding acceptance of food stamps for non-food items.

Even assuming *arguendo* that the store management had instructed Betty Gainer not to accept food stamps for non-food items, J.C.B. Super Markets, Inc., would still be liable for Miss Gainer's acts under the usual rules of agency since "the test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do" *Cosgrove v. Ogden*, 49 N.Y. 255, 257 (1872).

It is now settled beyond doubt that a corporation is liable for any tort committed by its agents in the course of the corporation's business, even though the act may be done wantonly and recklessly, or against the express orders of the principal. *Lakeshore and Michigan Southern Railway Company v. Prentice*, 147 U.S. 101, 109 (1893). "In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of

his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct" *New York Central Railroad v. United States*, 212 U.S. 481, 493 (1909). While JCB argues that Miss Gainer's purpose was personal and not of any benefit to the corporation, it is obvious that JCB derives a financial benefit whenever any of its goods are sold, whether in return for cash or food stamps. There are other apparent benefits to the corporation. For example, Mr. Perna testified that customers frequently allow the cashiers to ring up the total purchase, including both food and non-food items, before disclosing their intent to use food stamps for the entire purchase. If the employee refused to accept the food stamps, "Many, many times" the customer would simply leave all the merchandise in the cart for the cashier to return to the shelves: "that is a big job. It takes an awful long time . . . It is a frustrating disaster" (Suppl App 98-100). In those instances, where the cashier accepts the food stamps for the non-food items, the store benefits from the cashier's acts by saving its employees' time in returning the items to the shelves. Moreover, Mr. Perna went so far as to commend his employees' "loyalty to the company in trying to get people out of the store in a hurry. If the lines back up, we try to give better service. We put everything at our disposal to get the people moving" (Suppl App 101). In other words, the faster the customers move, the more the store will sell.

JCB further argues that the normal rules of agency applicable to civil disputes should not apply to this disqualification action since, the store contends, the suspension "bears a close resemblance to criminal liability . . . and its sanction has rather severe penal consequences" (appellant's brief, 12). However, even if the statute were construed to impose criminal sanctions, JCB may still be held liable on the facts of this case, under the persuasive rationale of the

Supreme Court in *New York Central Railroad v. United States*, 212 U.S. 481 (1909). In affirming the railroad's conviction for paying unlawful rebates to shippers where the culpable acts were performed by the railroad's assistant traffic manager, the Court took note of the rule applicable to civil liability and said that

We go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises. 212 U.S. at 494.

In reaching its decision the Court said

We see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. (citations omitted) If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy. 212 U.S. at 494-495.

Just as the Supreme Court found strong public policy reasons for imputing criminal liability to the railroad in the *New York Central* case, this Court should take note of the stated policy of Congress "to raise levels of nutrition among low-income households" and to alleviate hunger and malnutrition by creation of a food stamp program. In order to effectuate the Congressional purpose and assure that food stamps are used in the manner intended by Congress, the acts of Betty Gainer should be sufficient to bind her employer to their predictable consequences. To rule otherwise would encourage food stores to condone violations of the food stamp procedures and later to disclaim any responsibility for the conduct of their employees when held to account by the USDA.

The circumstances in the instant case resemble the facts in *United States v. Illinois Central Railroad Company*, 303 U.S. 239 (1938) where the Supreme Court held that a defendant railroad could be held liable for "knowingly and willfully" failing to comply with Title 45, United States Code, Section 71, which prohibited the confinement of cattle in railroad cars for longer than twenty-eight consecutive hours. The respondent railroad argued that since the violation was caused by its yard master's negligence and oversight, the railroad did not "knowingly and willfully" commit the violation. The Court rejected the defense and said

As between the government and respondent, the latter's breach is precisely the same in kind and degree as it would have been if its yard master's failure had been intentional instead of merely negligent. The duty violated did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public. As respondent could act only through employees, it is responsible for their failure. 303 U.S. at 244.

In the *Illinois Central* case the employee's duty to the public was to assure healthful and sanitary conditions in the transportation of livestock. In the implementation of the food stamp program, the participating food stores owe a duty to the public to comply with the requirements of the Food Stamp Act to the end that hunger and malnutrition may be alleviated throughout our society.

POINT III

The District Court may not modify the sanction imposed by the Department of Agriculture.

Congress authorized judicial review of USDA's determination to disqualify a food store in Title 7, United States

Code, Section 2022 which provides that "the suit in the United States district Court or State Court shall be a trial *de novo* by the Court in which the Court shall determine the validity of the questioned administrative action in issue. If the Court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence." This section has given rise to varying judicial interpretations of a district Court's permissible scope of review.

The Sixth Circuit Court of Appeals has held that "the statute authorizes a review only on the merits of the case, and not on the period of disqualification" *Martin v. United States*, 459 F.2d 300 (6th Cir., 1972). The *Martin* majority stated that "the reviewing Court is authorized to 'determine the validity of the questioned administrative action in issue'. The Court did make that determination by holding that the stores were disqualified from participation in the Food Stamp Program because of the admitted repeated violations. Upon making that determination the jurisdiction of the Court ended" 459 F.2d at 302. The *Martin* decision has been followed by other panels of the Sixth Circuit, *Saunders v. United States*, 507 F.2d 33 (6th Cir., 1974), *Sitto v. United States*, 492 F.2d 1244 (6th Cir., 1974) (unreported), by the Seventh Circuit, *Save More of Gary, Inc. v. United States*, 442 F.2d 36 (7th Cir., 1971), and by most district Courts in other circuits that have considered the matter: *Marcus v. United States Department of Agriculture*, 364 F.Supp. 374 (E.D.Pa. 1973); *Eckstut v. Hardin*, 363 F.Supp. 701 (E.D.Pa. 1973); *Miller v. United States*, 345 F.Supp. 1131 (W.D.Pa. 1972); *Great Atlantic and Pacific Tea Company v. United States*, 342 F.Supp. 492 (S.D.N.Y. 1972); and *Smith v. United States*, 392 F.Supp. 1116 (W.D.La. 1975).⁶

⁶ See also *American National Foods, Inc. v. United States Department of Agriculture*, 381 F.Supp. 1021 (M.D.Tenn. 1974); *Farmingdale Supermarket, Inc. v. United States*, 336 F.Supp. 534 (D.N.J. 1971); and *Marbro Foods, Inc. v. United States*, 293 F.Supp. 754 (N.D.Ill. 1968).

The Fourth Circuit Court of Appeals had adopted the *Martin* interpretation in *Welch v. United States*, 464 F.2d 682 (4th Cir., 1972) until its recent reconsideration of the issue *en banc* in *Cross v. United States*, 512 F.2d 1212 (4th Cir., 1975). The majority in *Cross* held that

Only in those instances in which it may fairly be said on the *de novo* record as a whole that the Secretary, acting through his designate, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty . . . In those instances in which a district court may find on the *de novo* review that the Secretary erred in his determination of the . . . gravity of the violations, it would be incumbent on the district court to prescribe an alternate penalty, not on the basis of what it, in the exercise of its judgment, would consider reasonable an' just, but within the guidelines set by the Secretary for the enforcement of the Act. 512 F.2d at 1218.

Judges Field and Russell dissented in *Cross*, both urging that the *Martin* and *Welch* decisions be followed. Judge Widener concurred in the decision reached by the *Cross* majority, but on the grounds that the "trial *de novo*" language authorized the district Court to "make its own independent judgment as to the term of the disqualification" within the limits authorized by statute and regulation. 512 F.2d at 1221. The Fifth Circuit Court of Appeals reached essentially the same conclusion as the *Cross* majority in the recent case of *Goodman v. United States*, 518 F.2d 505 (5th Cir., 1975).

Subsequent to the Sixth Circuit's decision in the *Martin* case, the Supreme Court had occasion to rule on the scope of judicial review of suspension periods under the Packers and Stockyards Act, which authorizes the Court of appeals "to affirm, set aside, or modify" orders of the Secretary issued under that Act. Title 7, United States Code, Section 194(h). In *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186

(1973), the Court held that the Secretary's choice of sanction "was not to be overturned unless the Court of Appeals might find it 'unwarranted in law or . . . without justification in fact . . .' ". The Court approved the following statement by the lower Court describing the applicable scope of review:

Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere . . . (A)ppellate Courts (may not) enter the more specious domain of public policy which Congress has entrusted to the various regulatory agencies. 411 U.S. at 186 n.3

In his decision directing judgment in favor of the USDA, Judge Curtin did not discuss the *Martin* or *Glover Livestock* cases. Instead, he said he believed that "the better view is expressed in the case of *Cross v. United States*" (App 63). The Court therefore considered the testimony of Joseph Perna regarding the "severe economic hardship which would be visited upon the store by a thirty-day disqualification" (App 64). The Court also considered "the presentations made to the agency by JCB which set forth in detail its argument that a disqualification would impose a drastic hardship" (App 65). Measuring the evidence by the standard adopted by the *Cross* majority, Judge Curtin determined that the Secretary of Agriculture had not abused his discretion or acted arbitrarily or capriciously. He therefore declined to modify the disqualification penalty. However, the Court went even further and considered the evidence in light of the standard suggested by Judge Widener, but still reached the conclusion that the penalty should not be changed.

While it seems apparent that the *Martin and Glover Livestock* rationale most closely comports with the language of the statute and with the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence'" *American Power Co. v. SEC*, 329 U.S. 90, 112 (1946), the record before this Court clearly shows that the trial judge afforded JCB the most expansive review under any interpretations of Section 2022. Since the trial Court's findings cannot be styled "clearly erroneous" by even the most generous standard of review, this Court should decline JCB's invitation to substitute its judgment for those of the USDA and the trial Court.

Conclusion.

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York) RE: J. C. B. Super Markets, Inc.
County of Genesee) ss.: v
City of Batavia) U.S.A. & U. S. Department of Agriculture
Docket No. 75-6063

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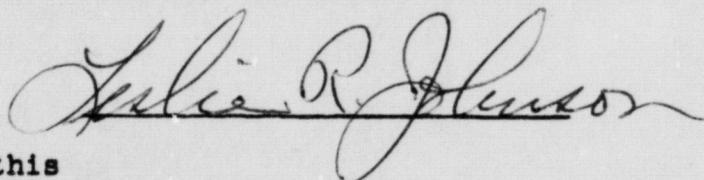
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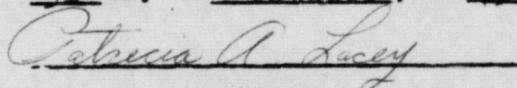
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